U.S. Department of Labor

Benefits Review Board
P.O. Box 37601
Washington, DC 20013-7601

BRB No. 16-0274 BLA

PEARL L. TREADWAY (Surviving Divorced Spouse of WILLIAM C. TREADWAY)	)	
Claimant-Respondent	)	
v.	)	
MYSTIC ENERGY	)	DATE ISSUED: 03/31/2017
and	)	
WEST VIRGINIA COAL WORKERS' PNEUMOCONIOSIS FUND	)	
Employer/Carrier-Petitioners	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order of Theresa C. Timlin, Administrative Law Judge, United States Department of Labor.

S.F. Raymond Smith, Charleston, West Virginia, for claimant.

Karin L. Weingart (Spilman, Thomas & Battle, PLLC), Charleston, West Virginia, for employer/carrier.

Before: Hall, Chief Administrative Appeals Judge, GILLIGAN and ROLFE, Administrative Appeals Judges.

HALL, Chief Administrative Appeals Judge:

Employer/carrier (employer) appeals the Decision and Order (2012-BLA-06174) of Administrative Law Judge Theresa C. Timlin awarding benefits on a claim filed pursuant to provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act). This case involves a survivor's claim filed on June 22, 2010.

The administrative law judge initially determined that claimant[1] is an eligible surviving divorced spouse, pursuant to 20 C.F.R. §725.216, and that she was dependent on the miner, pursuant to 20 C.F.R. §725.217(c). The administrative law judge accepted employer's concession that claimant invoked the Section 411(c)(4) rebuttable presumption that the miner's death was due to pneumoconiosis.[2] 30 U.S.C. §921(c)(4) (2012). The administrative law judge further found that employer did not rebut the Section 411(c)(4) presumption. Accordingly, the administrative law judge awarded benefits.

On appeal, employer contends that the administrative law judge erred in finding that claimant was dependent on the miner in the month before his death. Claimant responds, urging affirmance of the administrative law judge's finding that she is entitled to benefits. The Director, Office of Worker's Compensation Programs, has not filed a response brief.[3]

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is rational, supported by substantial evidence, and in accordance with applicable law.[4] 33 U.S.C. §921(b)(3), as incorporated by 30

[1] Claimant is the divorced spouse of the miner, who died on June 15, 2010. Director's Exhibit 9. Claimant's counsel informs the Board that claimant died in January of 2016, and her son is now pursuing her claim. Claimant's Brief at 2 (unpaginated).

[2] Section 411(c)(4) of the Act provides a rebuttable presumption that a miner's death was due to pneumoconiosis in cases where fifteen or more years of qualifying coal mine employment and a totally disabling respiratory impairment are established. 30 U.S.C. §921(c)(4) (2012); *see* 20 C.F.R. §718.305.

[3] We affirm, as unchallenged on appeal, the administrative law judge's determinations that claimant invoked the Section 411(c)(4) presumption of death due to pneumoconiosis and that employer failed to rebut the presumption. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

[4] The miner's last coal mine employment occurred in West Virginia. Director's Exhibit 4. Accordingly, the Board will apply the law of the United States Court of

U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Employer argues that the administrative law judge erred in determining that claimant was eligible to receive benefits as a surviving divorced spouse. In order to be eligible for benefits, the surviving divorced spouse of a miner must be "dependent on the miner at the pertinent time." 20 C.F.R. §725.212(a)(2). In regard to this requirement, 20 C.F.R. §725.217 provides that:

> An individual who is the miner's surviving divorced spouse . . . shall be determined to have been dependent on the miner if, for the month before the month in which the miner died:
>
> (a) The individual was receiving at least one-half of his or her support from the miner (see §725.233(g)); or
>
> (b) The individual was receiving substantial contributions from the miner pursuant to a written agreement (see §725.233(c) and (f)); or
>
> (c) A court order required the miner to furnish substantial contributions to the individual's support (see §725.233(c) and (e)).

20 C.F.R. §725.217. For purposes of establishing "substantial contributions" pursuant to 20 C.F.R. §725.217(b) and (c), the court order or written agreement must be "in effect at the applicable time." 20 C.F.R. §725.233(e), (f). Substantial contributions are contributions that are "customary and sufficient to constitute a material factor in the cost of the individual's support." 20 C.F.R. §725.233(c).

The administrative law judge reviewed the record and determined that claimant was receiving $400.00 a month in contributions from the miner until his death, as ordered by a Final Order of divorce (Divorce Decree). Decision and Order at 5. The administrative law judge further determined that the West Virginia Bureau of Child Support Enforcement (the Bureau) made the $400.00 alimony payment to claimant from withholdings taken from the miner's benefits, first from his state workers' compensation benefits and later, from his Social Security benefit payments. *Id.* The administrative law judge further found that claimant's expenses were $1,964.88, relying upon an expense sheet submitted by claimant for the month of June 2010. *Id*. at 5-6. The administrative

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Appeals for the Fourth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc).

law judge concluded that the miner's contributions were substantial contributions to claimant's support under 20 C.F.R. §725.217(c). *Id*. at 6.

Employer contends that the administrative law judge erred in finding that the support order in the Divorce Decree was in effect at the time of the miner's death, and therefore erred in evaluating the miner's contributions under 20 C.F.R. §725.217(c). Employer's Brief at 5-6. Specifically, employer argues that the Divorce Decree contains a self-executing clause that automatically terminated spousal support "in the event the [miner] would become unemployed and drawing Unemployment Compensation or Workers' Compensation." *Id*. at 5; Director's Exhibit 8. Employer argues that because the miner became unemployed in 2001 and began drawing a permanent total disability award as of August 13, 2002, the Divorce Decree automatically terminated the spousal support. Employer therefore contends that any subsequent contributions by the miner were voluntary, and had to be evaluated under 20 C.F.R. §725.217(a), which requires that claimant have been receiving at least one-half of her support from the miner. *Id.* at 6. We disagree.

The Divorce Decree set forth that the miner "shall" pay claimant $400.00 a month in spousal support until "[claimant] remarries, sooner dies, or until further Order of the Court." Director's Exhibit 8. The Divorce Decree further provided that, in the event the miner became unemployed, his spousal and child support contributions would be reduced to partial child support. *Id*. In turn, those contributions would immediately resume upon the miner's return to employment. *Id*. However, the administrative law judge correctly noted that, despite the termination clause, "the miner, through [the Bureau], continued to provide alimony support to claimant from the time of the divorce in 1986 until his death in 2010." Decision and Order at 5.

Specifically, the administrative law judge noted that the Bureau garnished the miner's benefits in the amount of $400.00 a month, first those he received from the West Virginia Workers' Compensation Program and then those from the Social Security Administration. Decision and Order at 5; Director's Exhibits 19, 27. The Bureau then provided the funds to claimant for her court-ordered spousal support. *Id*. The administrative law judge reasonably determined that the three agencies involved in securing claimant's spousal support from the miner's benefits payments were working under the legal authority provided by the Divorce Decree. We affirm the administrative law judge's finding that the miner was providing support to claimant pursuant to an effective court order under 20 C.F.R. §725.217(c), as it is rational, supported by substantial evidence, and in accordance with law.

Employer further contends that the record is unclear as to whether the miner's contributions, received by the Bureau from the miner's Social Security benefit payments,

were contributions from the miner's property under 20 C.F.R. §725.233(b). Employer's Brief at 10-11. We disagree.

Contributions must be actual contributions made by the miner from his property, the use of his property, or the use of his credit. 20 C.F.R. §725.233(b). Social Security benefits payable to a surviving divorced spouse based upon the miner's earnings record are not contributions under the Act, because they are not provided from the miner's property. *Taylor v. Director, OWCP*, 967 F.2d 961, 964, 16 BLR 2-84, 2-89 (4th Cir. 1992). Here, however, the administrative law judge correctly found that the contributions being made by the miner were collected by the Bureau by withholding payments from the miner's Social Security benefits.[5] Decision and Order at 5. Further, unlike the miner in *Taylor*, who had "none of the aspects of control over [the divorced spouse's] benefits that would normally be attributed to a property right," *Id*., the miner here could have reduced or ended the payments that were being taken from his Social Security benefits by requesting that the spousal support order in the Divorce Decree be modified. Director's Exhibit 8. Therefore, we reject employer's argument that the $400.00 monthly payments that claimant was receiving were not contributions from the miner under 20 C.F.R. §725.233(b).

Employer argues that the administrative law judge erred in finding that the evidence establishes that claimant was dependent upon the miner at the applicable time. Employer's Brief at 7-10. Specifically, employer argues that the administrative law judge shifted the burden of proof by relying upon claimant's expenses from the month in which the miner died when determining dependency. *Id*. at 7-8. We disagree.

Pursuant to 20 C.F.R. §725.217(c), dependency is established by demonstrating that a court order required the miner to furnish substantial contributions to claimant's support "for the month before the month in which the miner died." The miner died on June 15, 2010. Therefore, the administrative law judge recognized that claimant needed to demonstrate that the miner's $400.00 contribution was a substantial contribution relative to her expenses for the month of May 2010. Decision and Order at 4, 6.

Prior to obtaining counsel, claimant submitted a detailed one-page statement of her income and expenses for June of 2010. Director's Exhibits 19, 26. The administrative law judge acknowledged that claimant's statement of income and expenses was for June 2010 rather than May 2010. Decision and Order at 6. The administrative law judge inferred, however, that claimant's income and expenses would have been "similar one

[5] The record includes a letter from the Bureau stating that it was withholding funds from the miner's own Social Security benefit payments. Director's Exhibits 19, 27.

month earlier," and—noting that there was no evidence to the contrary—found that claimant therefore met her burden to establish her expenses for May 2010.[6] *Id*.

Contrary to employer's argument that the administrative law judge created a presumption and shifted the burden of proof, the administrative law judge drew a reasonable inference that claimant's expenses in May would have mirrored the expenses that she documented for June. *See Underwood v. Elkay Mining, Inc.*, 105 F.3d 946, 949, 21 BLR 2-23, 2-28 (4th Cir. 1997). A review of the statement submitted by claimant reflects expenses totaling $1,964.88, including commonly recurring items such as a mortgage payment, truck payment, credit card payment, food, utilities, insurance, taxes, and maintenance costs. Director's Exhibit 19. Indeed, the bulk of the outlays are for needs that would be considered "[f]ixed living expenses" were they at issue in an overpayment case. *See* 20 C.F.R. §404.508(a)(1).

Based on the recurring nature of claimant's modest expenses, the administrative law judge rationally found that claimant's June expenditures would be similar to her May expenditures and that claimant therefore submitted sufficient evidence to determine whether the miner made substantial contributions to claimant's support in May 2010. *See* 20 C.F.R. §725.217(c); *Underwood*, 105 F.3d at 949, 21 BLR at 2-28. We see no error in the administrative law judge's reasoning. Given the type of subsistence expenses claimant listed, it was eminently reasonable to conclude that they would not change so significantly in such a short period of time such that $400 would cease to be a significant contribution, particularly in the absence of any evidence to the contrary. On the specific facts of this case, we therefore affirm the administrative law judge's finding. *See, e.g., Piney Mountain Coal Co. v. Mays*, 176 F.3d 753, 764, 21 BLR 2-587, 2-591 (4th Cir. 1999)(explaining that substantial evidence means evidence of "sufficient quality and quantity as a reasonable mind might accept as adequate to support the finding under review").[7]

[6] After claimant submitted her expense sheet, she retained counsel, who appeared on her behalf at the hearing on November 6, 2013. Claimant did not appear and testify at the hearing.

[7] The dissent argues that the plain language of the statute requires the fact-finder to make a determination of the widow's expenses the month before the miner died. We agree. But it does not follow from that language that the only evidence relevant to the inquiry are the expenses generated in that month, particularly where, as here, a widow's expenses are fixed and modest. Indeed, the only specific allegation of error employer makes in considering claimant's June 2010 expenses actually hurts its case: employer speculates that they may have been inflated by hypothetical new expenses, or by the inclusion of expenses that typically are not billed monthly. Employer's Brief at 7-8. But

Employer further argues that the administrative law judge erred in finding that the miner's contributions were substantial. Employer's Brief at 10. Specifically, employer argues that the administrative law judge found the miner's contributions were substantial based only upon the length of time that the payments were made, without considering whether the contributions were a material factor in claimant's support.[8] *Id*. We disagree.

Substantial contributions are contributions that are "customary and sufficient to constitute a material factor in the cost of the individual's support." 20 C.F.R. §725.233(c). Contrary to employer's argument, the administrative law judge determined that the miner's contributions covered 20% of claimant's expenses for June of 2010. Decision and Order at 5. The administrative law judge then rejected employer's argument that this amount was not sufficient to be substantial. *Id*. The administrative law judge properly determined that the miner's contributions were both customary and constituted a material factor in claimant's support and, therefore, constituted substantial contributions pursuant to 20 C.F.R. §725.233(c). *Id*. We therefore affirm the administrative law judge's determination that the miner's contributions were substantial pursuant to 20 C.F.R. §725.233(c). Consequently, we affirm the administrative law judge's determination that claimant established that she was dependent upon the miner pursuant to 20 C.F.R. §725.217(c), and was entitled to benefits pursuant to 20 C.F.R. §725.212(a).

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if such items were excluded claimant's expenses would be reduced, thereby increasing the proportion of her support covered by the miner's $400.00 contribution. And while employer correctly notes that other costs, such as water and electricity, may vary by usage, employer advances no reason for the administrative law judge to suspect that claimant's costs for those items in May would have been significantly *higher* than they were in June, when gauging the substantiality of the miner's $400 contribution.

[8] Employer also argues that, when a miner's contributions are only 20% of the survivor's expenses, those contributions are insufficient as a matter of law to meet the standard of substantial contributions under 20 C.F.R. §725.217(c). Employer's Brief at 8-9. Employer offers no authority for this proposition, and the Board rejects it.

Accordingly, the administrative law judge's Decision and Order awarding benefits is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

I concur.

JONATHAN ROLFE
Administrative Appeals Judge

GILLIGAN, Administrative Appeals Judge, concurring and dissenting:

I concur in the majority's affirmance of the administrative law judge's findings that claimant was receiving contributions from the miner's property pursuant to an effective court order. However, I respectfully dissent from the majority's decision to affirm the administrative law judge's decision to rely on claimant's expenses from an incorrect month in determining whether the miner's contributions were substantial pursuant to 20 C.F.R. §715.217(c).

The task of resolving the dispute in this case begins, as all such inquiries must begin, with the language of the statute itself. *Landreth Timber Co. v. Landreth*, 471 U.S. 681, 685 (1985). But for this case it is also where the inquiry ends, for where, as here, the statute's language is plain, "the sole function of the courts is to enforce it according to its terms." *United States v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 241 (1989) (quoting *Caminetti v. United States*, 242 U.S. 470, 485 (1917)). The plain language of

the statute and the regulations place the burden on claimant to demonstrate that a court order required the miner to furnish substantial contributions to her support in May of 2010, the month before the month in which the miner died. 30 U.S.C. §902(e); 20 C.F.R. §725.217. The Board is not free to deviate from the plain language of an unambiguous statute.

Excusing the administrative law judge's failure to follow the plain language of the statute, the majority holds that "the administrative law judge drew a reasonable inference that claimant's expenses in May would have mirrored the expenses that she documented for June." *See* p. 6, *infra.* In fact, the administrative law judge simply "assume[d]" that claimant's income and expenses in June of 2010 were similar to her expenses in May of 2010. Decision and Order at 6. The administrative law judge justified the legitimacy of her assumption by noting that (1) claimant was acting without the assistance of an attorney at the time she submitted her expenses; and (2) there was no contradictory evidence to show that claimant's income and expenses differed from month to month. Decision and Order at 6. The statute, however, does not excuse an unrepresented claimant from compliance with its conditions. Additionally, the administrative law judge's reliance on the lack of contradictory evidence effectively placed a burden on employer that does not exist, while exonerating claimant from her statutory burden of establishing her dependency as the surviving divorced spouse. *See Putman v. Director, OWCP*, 12 BLR 1-127, 1-129-30 (1988); *McCoy v. Director, OWCP*, 7 BLR 1-780 (1985).

Moreover, whether characterized as an inference or an assumption, the administrative law judge provided no basis for her finding that claimant's expenses for May of 2010 and June of 2010 were "similar." *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989). The majority attempts to provide a basis for the administrative judge's determination by characterizing claimant's monthly expenses as "recurring" and "modest." *See* p. 6, *infra.* The administrative law judge, however, made no such findings.

Because the administrative law judge, in this case, did not compare the monetary contributions claimant received to her expenses for the proper month, as required by 20 C.F.R. §725.217, I would vacate the administrative law judge's finding that the miner furnished substantial contributions to claimant's support. On remand, I would note that the administrative law judge has the discretion to reopen the record to allow for the submission of testimony or other relevant evidence regarding claimant's expenses in May 2010. *See Troup v. Reading Anthracite Coal Co.*, 22 BLR 1-11, 1-21 (1999) (en banc); *Lynn v. Island Creek Coal Co.*, 12 BLR 1-146, 1-148 (1989).

RYAN GILLIGAN
Administrative Appeals Judge